

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAY - 4 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of
Competitive Telecommunications Association
Florida Competitive Carriers Association and
Southeastern Competitive Carriers Association
CC Docket No. 98-39
Petition on Defining Certain Incumbent LEC
Affiliates as Successors, Assigns, or
Comparable Carriers Under Section 251(h)
of the Communications Act

MOTION TO ACCEPT LATE-FILED PLEADING

The Telecommunications Resellers Association ("TRA"), through undersigned counsel, hereby requests that, for good cause shown, the Commission accept TRA's late-filed Comments in the above-captioned proceeding.

TRA experienced logistical difficulties beyond its control related to the filing of the above-referenced Comments on the afternoon of May 1, 1998. As a result, TRA was unable to deliver the Comments to the Office of the Secretary prior to the close of the Commission's official workday.


Grant of TRA's Motion by the Commission would not result in harm to any party to this proceeding since the Comments are being filed, and served upon the petitioners by hand, on the business day immediately following the filing deadline.

No. of Copies rec'd 0212
List ABCDE

Accordingly, for good cause shown, the Telecommunications Resellers Association requests that the Commission grant TRA's Motion to Accept TRA's Comments in the above-referenced docket.

Respectfully submitted,

**TELECOMMUNICATIONS
RESELLERS ASSOCIATION**

By: 
Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

May 4, 1998

Its Attorneys

CERTIFICATE OF SERVICE

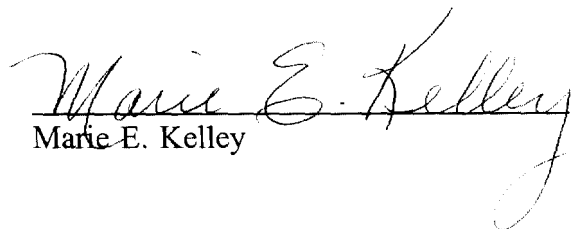
I, Marie E. Kelley, hereby certify that copies of the foregoing document were mailed
this 4th day of May, 1998, by United States First Class mail, postage prepaid, to the
following:

Genevieve Morelli
Competitive Telecommunications Assoc.
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036

David L. Sieradzki
Jennifer A. Purvis
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20554

Janice Myles
Federal Communications Commission
Common Carrier Bureau
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

International Transcription Services, Inc.
1919 M Street, N.W.
Room 246
Washington, D.C. 20036


Marie E. Kelley

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

ORIGINAL

In The Matter of

**Competitive Telecommunications Association
Florida Competitive Carriers Association and
Southeastern Competitive Carriers Association**

CC Docket No. 98-39

**Petition on Defining Certain Incumbent LEC
Affiliates as Successors, Assigns, or
Comparable Carriers Under Section 251(h)
of the Communications Act**

**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to *Public Notice*, DA 98-627 (released April 1, 1998), hereby submits the following comments in support of the Petition for Declaratory Ruling or, in the Alternative, for Rulemaking ("Petition") filed by the Competitive Telecommunications Association ("CompTel"), the Florida Competitive Carriers Association ("FCCA"), and the Southeastern Competitive Carriers Association ("SECCA") (collectively, "Petitioners") in the captioned proceeding on March 23, 1998. In their Petition, Petitioners seek a declaratory ruling that an incumbent local exchange carrier

¹ A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services.

("ILEC") "that operates under the same or a similar brand name and provides wireline local exchange or exchange access service within the ILEC's region" will be (i) "considered a 'successor or assign' of the ILEC under Section 251(h)(1)(B)(ii) of the Communications Act," and (ii) treated as a 'dominant carrier' for the provision of interstate service."² In the alternative, Petitioners urge the Commission to initiate a rulemaking proceeding to establish "a rebuttable presumption" that such an ILEC affiliate is a "comparable" carrier under Section 251(h)(2).³ TRA agrees with Petitioners that to the extent an ILEC affiliate offers local service under the ILEC's brand name (or a variation thereof) within the ILEC's local service area, it should be deemed a "successor or assign" of the ILEC or, at a minimum, a "comparable carrier" to the ILEC. To hold otherwise would eviscerate the regulatory regime adopted by Congress to open the local exchange/exchange access market to competition.⁴

In incorporating "successors" and "assigns" of ILECs into the definition of "incumbent local exchange carriers," Congress clearly intended to thwart ILEC efforts to circumvent the requirements of Section 251 through strategic asset transfers and other transactional machinations. Congress' subsequent references to "comparable carriers" evidences a recognition that the Section 251 obligations must be imposed on all entities that are in a position to hinder competition if the goal of opening the local market to competition is to be achieved. As the Commission has often declared, the "overriding goal" of the Telecommunications Act was and is

² Petition at 2.

³ Id. at 13 - 15; 47 C.F.R. § 251(h)(2).

⁴ Pub. L. No. 104-104, 110 Stat. 56, §§ 101, 151 (1996).

"to open all telecommunications markets to competition."⁵ The network-opening duties imposed on ILECs by Section 251(c) are the means adopted by Congress to achieve this end.⁶ As recently described by the Commission, "Section 251's primary purpose is to foster competition that otherwise would not likely develop in local exchange and exchange access markets."⁷ Hence, the prospects for the emergence of local competition will be seriously diminished to the extent that the Section 251 obligations can be readily avoided by ILECs.

The Commission has recognized that evasion of statutory requirements by ILECs through strategic asset transfers and other transactional machinations represent "legitimate concerns."⁸ Thus, the Commission elected to "treat a BOC affiliate as a 'successor or assign' of the BOC if the BOC transfers network elements to the affiliate."⁹ As explained by the Commission, this holding was necessary to prevent Bell Operating Companies ("BOCs") from "circumvent[ing] the section 271 requirements by transferring local exchange and exchange access facilities and

⁵ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd. 20543, ¶ 10 (1997).

⁶ 47 C.F.R. § 251(c).

⁷ Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Section 3(37) and 251(h) of the Communications Act; Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, 12 FCC Rcd. 6925, ¶ 41 (1997).

⁸ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905, ¶ 309 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *pet. for rev. pending sub nom. SBC Communications Corp. v. FCC*, Case No. 97-1118 (D.C. Cir. Mar. 6, 1997), *remanded in part sub nom. Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand FCC 97-222* (released June 24, 1997), *pet. for rev. denied sub nom Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1432 (D.C. Cir. Dec. 23, 1997).

⁹ Id. at ¶ 310.

capabilities to an affiliate."¹⁰ While it stopped short of deeming a BOC affiliate to be a successor or assign "solely because it obtains network elements from the BOC pursuant to Section 251(c)(3) of the Act,"¹¹ the Commission did not address the circumstance presented here by Petitioners in which an ILEC affiliate effectively assumes the mantle of the ILEC by using its brand name, as well as its financial and human resources.

Theoretically, an ILEC affiliate that obtains network elements or wholesale services from the ILEC will do so pursuant to the same terms and conditions such elements and services are available to an unaffiliated competitive provider of local service. Hence, theoretically, such a transaction should not raise "legitimate concerns" regarding "potential[] eva[sion] . . . [of] the section . . . 251 requirements."¹² Exclusive use by the ILEC affiliate of the ILEC brand name, and the goodwill associated therewith, however, does give rise to such concerns. The corporate names, logos and service brands of the BOCs and other large ILECs are extremely powerful competitive tools, having been pervasive presences in the marketplace. and a part of virtually all consumer's lives, for decades. In fact, apart from their monopoly control of network facilities, ubiquitous access to customers and brand identification are the two most valuable competitive assets held by ILECs.

An ILEC affiliate that operates under, or offers services pursuant to, the ILEC brand within the ILEC's local service area is for all practical purposes stepping into the shoes of the ILEC. An ILEC-branded ILEC affiliate is not comparable to an unaffiliated competitive provider. Rather,

¹⁰ Id. at ¶ 309.

¹¹ 47 C.F.R. § 207.

¹² Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905 at ¶ 309.

it is an extension of the ILEC itself, benefitting from most, if not all, of the competitive advantages that accrue to the ILEC. Comparability between an ILEC-branded ILEC affiliate and an unaffiliated competitor would be achieved only if the ILEC allowed competitive providers to use the ILEC brand name.

The example highlighted by Petitioners -- *e.g.*, BellSouth BSE -- is a clear illustration of this circumstance.¹³ The suggestion that BellSouth BSE will not be perceived by consumers as a mere extension of BellSouth, deriving the benefit of the name recognition accrued by BellSouth as the decades-long exclusive provider of local service within its service areas, is simply not credible. Because of its name and its obvious affiliation with BellSouth, BellSouth BSE will be essentially a retail arm for BellSouth through which BellSouth can operate free of the constraints of Section 251. In particular, BellSouth BSE, as Petitioners correctly note, will provide a vehicle through which BellSouth can offer contract service arrangements without having to make such offerings available for resale at wholesale rates.

As Petitioners correctly note, BellSouth has consistently "refused to offer contract service arrangements at a wholesale discount."¹⁴ Moreover, BellSouth's reliance upon contract service arrangements has increased dramatically since passage of the Telecommunications Act of

¹³ Petition at 3 - 7.

¹⁴ Id. at 6 - 7; Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC 97-418, ¶¶ 212 - 14 (released Dec. 24, 1997), *recon. pending, appeal pending sub. nom. BellSouth Corporation v. FCC*, No. 98-1019 (D.C.Cir. Jan. 3, 1998); Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231, FCC 98-17, ¶¶ 59 - 62 (released Dec. 24, 1997), *recon. pending, appeal pending sub. nom. BellSouth Corporation v. FCC*, No. 98-1087 (D.C.Cir. March 6, 1998).

1996.¹⁵ In other words, it appears that BellSouth is "attempting to avoid its statutory resale obligation by shifting its customers to CSAs."¹⁶ And as the Commission has acknowledged, "[b]y foreclosing resale of CSAs, BellSouth can prevent resellers from competing for large-volume customers, thus hindering local exchange competition."¹⁷

Certainly, neither BellSouth nor any other ILEC should not be permitted to accomplish indirectly what it is forbidden by law to do directly. Unless an ILEC affiliate offering ILEC-branded local service within the ILEC's local service area is deemed to be a successor or an assign of the ILEC, this will be the unfortunate result. TRA agrees with Petitioners that "decisive action" by the Commission is necessary to prevent this end run on Section 251.¹⁸

Given that an ILEC affiliate that uses the ILEC brand in offering local service within the ILEC's local service area will have significant attributes of the ILEC, rendering it for all practical purposes indistinguishable from the ILEC, TRA submits that the Commission should deem it a successor or assign of the ILEC. As such, it should be subjected by the Commission to all the regulatory duties and regulatory constraints borne by the ILEC, including not only the ILEC's Section 251 obligations, but the dominant carrier classification of the ILEC. In the event, however, that the Commission declines to treat such ILEC affiliates as ILEC successors or assigns, TRA agrees with Petitioners that the Commission should promulgate rules classifying ILEC affiliates

¹⁵ Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC 97-418 at ¶ 224.

¹⁶ Id.

¹⁷ Id.

¹⁸ Petition at 7.

engaged in the in-region provision of local service using the ILEC brand as "comparable carriers" under Section 251(h)(2).

As Petitioners note,¹⁹ an ILEC-branded ILEC local affiliate operating in the ILEC's local service area shares the ILEC's position in the market, thereby more than satisfying the first statutory criteria for a comparable carrier that the carrier occupy a position in the market comparable to the position occupied by the ILEC. And for purposes of serving selected market segments, such as businesses which are candidates for contract service arrangements, the ILEC-branded ILEC local affiliate has replaced the ILEC in the market, satisfying the second statutory criteria for comparability. Finally, and most critically, the public interest would be well served by preventing ILECs from circumventing the scheme adopted by Congress for opening local telecommunications markets to competition. As the Commission has elsewhere noted, "Congress has declared unequivocally that promoting competition in local exchange and exchange access markets serves the public interest, convenience and necessity" and, therefore, an entity should be treated as a comparable carrier if such action is "a prerequisite for the development of competition in the local exchange and exchange access markets."²⁰

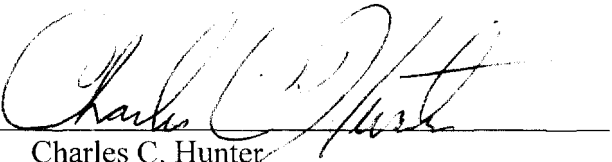
¹⁹ Petition at 13 - 15.

²⁰ Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Section 3(37) and 251(h) of the Communications Act; Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, 12 FCC Rcd. 6925 at ¶ 40.

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to grant the relief requested by the Competitive Telecommunications Association, the Florida Competitive Carriers Association, and the Southeastern Competitive Carriers Association and declare an ILEC successor or assign an ILEC affiliate using the ILEC brand in offering local service within the ILEC's local service area.

Respectfully submitted,

**TELECOMMUNICATIONS
RESELLERS ASSOCIATION**

By: 

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1620 I Street, N.W., Suite 701
Washington, D.C. 20006
(202) 293-2500

May 4, 1998

Its Attorneys

CERTIFICATE OF SERVICE

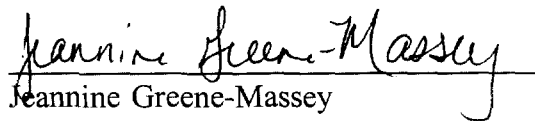
I, Jeannine Greene-Massey, hereby certify that copies of the foregoing document were mailed this 4th day of May, 1998, by United States First Class mail, postage prepaid, to the following:

Genevieve Morelli
Competitive Telecommunications Assoc.
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036

David L. Sieradzki
Jennifer A. Purvis
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20554

Janice Myles
Federal Communications Commission
Common Carrier Bureau
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

International Transcription Services, Inc.
1919 M Street, N.W.
Room 246
Washington, D.C. 20036


Jeannine Greene-Massey